

REMARKS

Prior to this Response,

An Office Action was issued, mailed July 17, 2002,

Objecting to CLAIMS 5, 10, 11, 14, and 15 for informalities; and

Rejecting CLAIMS 1-17.

In this Response:

regarding the Claims,

CLAIMS 5, 10, 11, 14, and 15 have been amended to correct the informalities as requested by the Examiner;

CLAIMS 1-8, 12, and 16 have been amended, and argument presented as to patentability, and reconsideration is requested of the rejection of CLAIMS 1-8, 12, and 16;

CLAIMS 9-11, 13-15, and 17 have been reiterated with argument as to patentability, and reconsideration is requested of the rejection of CLAIMS 9-11, 13-15, and 17.

No amendment made was related to the statutory requirements of patentability unless expressly stated herein. No amendment made was for the purpose of narrowing the scope of any claim, unless Applicant has argued herein that such amendment was made to distinguish over a particular reference or combination of references.

CLAIMS 1-17 are now pending in the present application. Applicant respectfully traverses the objections and rejections and requests reconsideration. Applicant believes that the claims are now in a condition to be allowed and asks for speedy issuance.

In addition to the above amendments, the Applicant makes the following remarks regarding individual issues:

THE APPLICANT'S TIME TO RESPOND

The last Office Action was mailed on July 17, 2002. The three-month initial deadline for responding without having to pay a penalty fee ends on October 17, 2002. Applicant files this response with a Certificate of Mailing in conjunction with 37 C.F.R. section 1.8.

CLAIM OBJECTIONS

The Examiner objected to CLAIMS 5, 10, 11, 14, and 15 for using the term "zigzag", contending that the term should be "zig-zag". Applicant has amended CLAIMS 5, 10, 11, 14, and 15 to use the term "zig-zag" as requested by the Examiner. Accordingly, Applicant respectfully traverses the objections and asks that the objections be removed.

THE SECTION 112 REJECTION

The Examiner rejected CLAIMS 8, 12, and 16 under 35 U.S.C. § 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter. Specifically, the Examiner contended that CLAIMS 8, 12, and 16 contained the trademark/trade name ZIP LOCK, rendering the marks uncertain. While disagreeing that use of the term "zip lock" in the claims, where the Specification has previously defined the term, renders the claims indefinite, Applicant has amended CLAIMS 8, 12, and 16 to replace the term "zip lock" with the definition supplied in the Specification, i.e., interlocking seams for a linear press-closure which holds together by interference between two linear elements of either side of the seal. See Specification,

page 5, lines 22-28. Applicant believes this amendment renders the Section 112 rejections of CLAIMS 8, 12, and 16 moot. Accordingly, Applicant traverses the rejections and asks that the rejections be withdrawn.

THE SECTION 102(B) ANTICIPATION REJECTION

The Examiner rejected CLAIMS 1, 2, 3, and 7 under 35 U.S.C. § 102(b) as being anticipated by U.S. Patent 3,304,945 to Anderson (hereinafter "Anderson").

Invalidity by anticipation requires that the four corners of a single prior art document describe every element of the claimed invention, either expressly or inherently, such that a person of ordinary skill in the art could practice the invention without undue experimentation. Advanced Display Systems Inc. v. Kent State University, 54 USPQ2d 1673 (Fed. Cir. 2000). "The identical invention must be shown in as complete detail as is contained in the ...claim." Richardson v. Suzuki Motor Co., 9 USPQ2d 1913, 1920 (Fed. Cir. 1989); MPEP 2131. Anticipation under 35 U.S.C. § 102(b) requires the presence in a single prior art reference disclosure of each and every element of the claimed invention, arranged as in the claim. Lindemann Maschinenfabrik GmbH. v. American Hoist & Derrick Co., 221 USPQ 481 (Fed. Cir. 1984).

Anderson teaches a hair treatment cap for selectively treating locks of hair, wherein the cap is made of flexible impervious material, preferably of plastic, and wherein is provided with a plurality of clamping means. The clamps are immediately adjacent openings in the cap. Clamp is made of a fixed element, which is a substantially rigid metal, plastic, or like substance, in conjunction with a movable element which acts like the opening of a jaw for the clamp. According to Anderson

"it is most desirable, however, that the movable jaw element be adapted to swing downwardly from fixed jaw element...This construction provides

means whereby the lock of hair is firmly clamped in position with a substantially fluid-tight seal whereby there is little or no likelihood that treating solution will seep downwardly through the clamp into contact with hair beneath the opening."

See Anderson, page 3, lines 20-28. According to Anderson, the clamp elements are held in clamping engagement by locking means, with a latch having a cam-shaped sector, which rotates, and which holds hair in a fluid type manner "preventing seepage of the treating agent under the cap". See Anderson, page 3, lines 29-41. Suitable clamps are shown to include a bifurcate spring clip with two jaw elements.

Applicant has amended CLAIM 1, from which CLAIMS 2, 3, and 7 depend, to include a slit width limitation of 1/64" to 1/4". The slit width of 1/64" to 1/4" limitation is not present in Anderson nor rendered obvious by Anderson because Applicant's invention does not have a clamp, as taught in Anderson. Thus, the width remains unchanged in use as the slit is not closed (in claims in which the ziplock limitation is added, it is noted that the slit width is not closed, but rather, the slit length is shortened by partial zipping). The requirement in Anderson of firmly shutting clamps precludes the slit width of Applicants' invention. Anderson requires that the slits be clamped shut. When clamped shut they will not have width of 1/64" to 1/4", as taught by Applicant. Anderson specifically precludes having such a wide gap, stating "the lock of hair is firmly clamped in position with a substantially fluid-tight seal". See Anderson, page 3, lines 23-27. Anderson specifically includes in its definition of "slit" the jaw like elements of the clamps. See Anderson, page 4, lines 34-35.

It is believed that the rejection has become moot by the present amendment to the claims in question. Specifically, CLAIM 1 has been amended to read:

1. (Amended) A hard head foil cap, comprising:

- a. a head cap; and
- b. a plurality of long narrow slits cut into the head cap such that shanks of hair can be pulled through any such slit for hair coloring, and wherein the slits have width in the range of 1/64" to 1/4".

CLAIMS 2-8 depend from CLAIM 1.

While Applicant believes the cited art did not anticipate CLAIMS 1, 2, 3, and 7, it is believed that the amendments make clear that Anderson does not apply. These amendments are supported in the Specification at page 6, lines 4-7.

Accordingly, the rejections are respectfully traversed and Applicant requests that the rejections be withdrawn.

THE SECTION 103(A) OBVIOUSNESS REJECTION

The Examiner rejected CLAIMS 4-6, 9, 10, 11, 13-15, and 17 under 35 U.S.C. § 103(a) as being unpatentable over Anderson. The Examiner rejected CLAIMS 8, 12, and 16 under 35 U.S.C. § 103(a) as being unpatentable over Anderson in view of U.S. Patent 3,103,993 to Sanzo (hereinafter "Sanzo").

In the case of a Section 103(a) obviousness rejection, it is the Patent Office's initial burden to put forward a prima facie case, without which the Applicant is not required to submit evidence of nonobviousness. MPEP 2142, 2143; In re Mayne, 41 U.S.P.Q.2d 1451, 1453 (Fed. Cir. 1997). The prima facie case requires:

"First, there must be some suggestion or motivation, either in the references themselves or in the knowledge generally available to one of ordinary skill in the art, to modify the reference or to combine reference teachings. Second, there must be a reasonable expectation of success. Finally, the prior art reference (or references when combined) must teach or suggest all the claim limitations. The teaching or suggestion to make the claimed combination and the reasonable expectation of success must both be found in the prior art, and not based on applicant's disclosure."

MPEP 2143. Section 103 requires analysis of a claimed invention as a whole:

"It is true that [the claimed invention] consists of a combination of old elements so arranged as to perform certain related functions. It is immaterial to the issue, however, that all of the elements were old in other contexts. What must be found obvious to defeat the patent is the claimed combination. ... Focusing on the obviousness of substitutions and differences, instead of on the invention as a whole, is a legally improper way to simplify the often difficult determination of obviousness."

The Gillette Co. v. S.C. Johnson & Son Inc., 16 USPQ2d 1923 (Fed. Cir. 1990).

Here, the Examiner rejected CLAIMS 8, 12, and 16 citing the ziplock limitation. The Examiner contended that zip lock is a trademark, rendering the claims indefinite. Applicant has amended CLAIMS 8, 12, and 16, as noted earlier, to replace "zip lock" in the claims with the definition in the specification, removing the grounds rejection.

Further, the Examiner combined Sanzo and Anderson to reject CLAIMS 8, 12, and 16. The Examiner contended that Sanzo discloses a similar device to Anderson having a ZIP LOCK closure, i.e., linear, interference fit. However, Anderson and Sanzo cannot be combined, and the ziplock limitation of CLAIMS 8, 12, 16 is not rendered obvious by a combination of Anderson and Sanzo.

First, Sanzo is not similar to Applicant's invention or to Anderson. Anderson teaches a head cap that goes over a head, with a plurality of slits made of jaw elements which clamp tightly shut on hair locks. Conversely, Sanzo teaches a hair enclosure that does not fit over the head, but rather, individual locks of hair are trapped in an enclosed container and treated. The hair locks in Sanzo are sealed within the container.

Second, there is no motivation to combine Anderson and Sanzo, and there is no reasonable likelihood that if such a combination were attempted that it would actually work. Sanzo and Anderson cannot be combined as suggested by the Examiner. Anderson specifically requires that hair locks be clamped, with the ends of the hair

extending freely beyond the clamp. This thus forecloses the use of Sanzo, which requires hair to be sealed within a container, not extending freely. Accordingly, because Anderson expressly precludes a combination which would include Sanzo, the rejections must be removed.

Third, Sanzo teaches away from the claimed invention as well as any combination with Anderson. A prior art reference may be considered to teach away when a person of ordinary skill, upon reading the reference, would be discouraged from following the path set out in the reference, or would be led in a direction divergent from the path that was taken by the applicant." Monarch Knitting Machinery Corp. v. Sulzer Morat GmbH, 45 USPQ2d 1977 (Fed. Cir. 1998). In effect, "teaching away" is a more pointed and probative form of skepticism expressed in the prior art. Id. Teaching away from the prior art supports a conclusion of nonobviousness. The Dow Chemical Co. v. U.S., 18 USPQ2d 1657 (Cl. Ct. 1990). Here, Sanzo teaches a hair enclosing contraption, which traps individual locks of hair for treatment—the antitheses of a cap where individual locks of hair are pulled through and are free. Sanzo would not lead a practitioner either to practice Anderson or Applicant's invention.

The Examiner rejected CLAIMS 5, 8, 10, 11/10, 14 and 15/14 contending that Anderson rendered the claims obvious because zigzag limitation was "obvious to one skilled in the art to form the zigzag shape." However, the zigzag limitation of CLAIMS 5, 8, 10, 11/10, 14, 15/14 is not rendered obvious by Anderson. The Examiner has not made a prima facie case of obviousness. The Examiner cited no authority for that proposition, nor explained how Anderson suggests a zigzag shape. Moreover, Anderson is contrary to a zigzag shape because the straight clamps disclosed and

explicitly taught in Anderson preclude a zigzag shape. Specifically, Anderson cannot work with a zigzag slit. The Examiner suggested that the Applicant has the burden of providing the purpose for the zigzag shape. That is not the case where the Examiner has not met a prima facie case. Thus, the burden cannot be shifted here. Nevertheless, Applicant points out that the purpose for Applicant's cap, as well as Anderson's is to facilitate stylish designs on hair. A zigzag design is stylish. Anderson precludes the use of a zigzag slit because of its clamping requirement. Applicant explicitly teaches a zigzag slit. Accordingly, the rejections should be removed.

The Examiner rejected CLAIMS 4, 9, 10, 11/9, 12, 13, 14, 15, 16, and 17 contending that Anderson rendered the slit width limitation of 1/64" to 1/4" obvious. However, the slit width limitation of 1/64" to 1/4" of CLAIMS 4, 9, 10, 11/9, 12, 13, 14, 15/13, 16, 17, and CLAIMS 1-8 as amended, is not rendered obvious by Anderson because Applicant's invention does not have a clamp, as taught in Anderson. Thus, the width remains unchanged in use as the slit is not closed (in claims in which the ziplock limitation is added, it is noted that the slit width is not closed, but rather, the slit length is shortened by partial zipping). The required use of firmly shutting clamps in Anderson precludes the slit width of Applicants' invention. Anderson requires that the slits be clamped shut. When clamped shut they will not have width of 1/64" to 1/4", as taught by Applicant. Anderson specifically precludes having such a wide gap, stating "the lock of hair is firmly clamped in position with a substantially fluid-tight seal". See Anderson, page 3, lines 23-27. Anderson specifically includes in its definition of "slit" the jaw like elements of the clamps. See Anderson, page 4, lines 34-35. Moreover, Applicant

amended CLAIM 1, from which CLAIMS 2-8 depend, to include the slit width limitation of 1/64" to 1/4".

The rejection is respectfully traversed as to all these claims. Moreover, Applicant has amended CLAIMS 1, 5, 8, 10, 12, 14, and 16. CLAIMS 2-8 depend from CLAIM 1. CLAIM 15/14 depends from CLAIM 14. It is believed that the rejection has become moot by the present amendments as to those claims.

It is respectfully requested that the rejections be withdrawn.

CONCLUSION

For the foregoing reasons, reconsideration and allowance of CLAIMS 1-17 of the application as amended is solicited. The Examiner is encouraged to telephone the undersigned at (360) 750-9931 if it appears that an interview would be helpful in advancing the case. The Applicant respectfully submits that the rejection of the pending claims must be withdrawn, and that this application is in condition for allowance. Such is earnestly requested.

Respectfully submitted,

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VERSION WITH MARKINGS TO SHOW CHANGES MADE

Claims

(blocks show deletions and underlines show additions)

I claim:

1. (Amended) A hard head foil cap, comprising:
 - a. a head cap; and
 - b. a plurality of long narrow slits cut into the head cap such that shanks of hair can be pulled through any such slit for hair coloring, and wherein the slits have width in the range of 1/64" to 1/4".
2. (Amended) The hard head foil cap of claim 1, wherein said cap is made of plastic, foam, or rubber, or waterproof fabric.
3. (Amended) The hard head foil cap of claims 1 or 2, wherein the slits are configured in two or more orientations.
4. (Amended) The hard head foil cap of claim 1 or 2, wherein the slits have length in the range of 1" to 4" [and width in the range of 1/64" to 1/4"].
5. (Amended) The hard head foil cap of claims 1 or 2, wherein said slits are zig-zag shaped.
6. (Amended) The hard head foil cap of claims 1 or 2, wherein the slits are spaced apart with spacing in the range of 1/2" to 2".
7. (Amended) The hard head foil cap of claims 1 or 2, wherein the slits are reinforced by one of the group selected from stitching the slits and adding thicker plastic around the slits.
8. (Amended) The hard head foil cap of claims 1 or 2, wherein the slits are configured [in a zip lock fashion] with interlocking seams for a linear press-closure which holds together by interference between two linear elements of either side of the seal such that the slit can be partially closed to tighten the slit upon the shank of the hair.

9. A hard head foil cap, comprising:
 - a. a head cap, wherein said cap is made of plastic, foam, or rubber, or waterproof fabric; and
 - b. a plurality of long narrow slits cut into the head cap such that shanks of hair can be pulled through any such slit, and wherein the slits are configured in two or more orientations, wherein the slits have length in the range of 1" to 4" and width in the range of 1/64" to 1/4", and wherein the slits are spaced apart with spacing in the range of 1/2" to 2".
10. (Amended) The hard head foil cap of claim 9, wherein said slits are zig-zag shaped.
11. (Amended) The hard head foil cap of claims 9 or 10, wherein the slits are reinforced by one of the group selected from stitching the slits and adding thicker plastic around the slits.
12. (Amended) The hard head foil cap of claim 9, wherein the slits are configured [in a zip lock fashion] with interlocking seams for a linear press-closure which holds together by interference between two linear elements of either side of the seal such that the slit can be partially closed to tighten the slit upon the shank of the hair.
13. A method of treating hair, comprising steps of:
 - a. Placing a head cap over the hair of the person whose hair is to be colored, wherein said cap is made of plastic, foam, or rubber, or waterproof fabric, wherein said cap is provided with a plurality of long narrow slits cut into the head cap such that shanks of hair can be pulled through any such slit for hair coloring, and wherein the slits are configured in two or more orientations, wherein the slits have length in the range of 1" to 4" and width in the range of 1/64" to 1/4", and wherein the slits are spaced apart with spacing in the range of 1/2" to 2";
 - b. Pulling shanks of hair through said slits;

- c. Treating said hair shank by coloring, frosting, foiling, bleaching or dying; and
 - d. Repeating steps (b) through (c) until the hair is the treatment is done.
- 14. (Amended) The method of coloring hair of claim 13, wherein said slits are zig-zag shaped.
- 15. (Amended) The method of coloring hair of claims 13 or 14, wherein the slits are reinforced by one of the group selected from stitching the slits and adding thicker plastic around the slits.
- 16. (Amended) The method of coloring hair of claim 13, wherein the slits are configured [in a zip lock fashion] with interlocking seams for a linear press-closure which holds together by interference between two linear elements of either side of the seal such that the slit can be partially closed to tighten the slit upon the shank of the hair.
- 17. A head cap made from the process consisting of:
 - a. Cutting a plurality long narrow slits along the sides of a hair cap, wherein said slits with length between 1" and 4" and width between 1/64" and 1/4"; and
 - b. Cutting a plurality of long narrow slits around the top of a hair cap, wherein said slits have length between 1" and 4" and width between 1/64" and 1/4".